

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-092857

04/07/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

THOMAS E BLANKENBAKER

THOMAS E BLANKENBAKER
8429 E DEL CAMINO DR
SCOTTSDALE AZ 85258

v.

STATE OF ARIZONA, et al.

ROBERTO PULVER

MARC H HARRIS
OFFICE OF ADMINISTRATIVE
HEARINGS

MINUTE ENTRY

This Court has jurisdiction of this administrative review action pursuant to the Administrative Review Act, A.R.S. Section 12-901 et seq.

This Court has considered and reviewed the memoranda and oral arguments submitted to the court and the record from the Arizona State Board of Chiropractic Examiners. This case has been under advisement since oral argument on February 11, 2004. This decision is made within sixty days as required by Rule 9.9, Maricopa County Superior Court Local Rules of Practice.

Standard of Review

Pursuant to A.R.S §12-910(e) this court may review administrative decisions in special actions and proceedings in which the State is a party:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the

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evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

The scope of review of an agency determination under administrative review places the burden upon the Plaintiff to demonstrate that the agency's decision was arbitrary, capricious, or involved an abuse of discretion.¹ The reviewing court may not substitute its own discretion for that exercised by an administrative agency,² but must only determine if there is any competent evidence to sustain the decision.³

Case History

In October and November of 1999, the Arizona Board of Chiropractic Examiners received two separate complaints against Plaintiff, Dr. Thomas E. Blankenbaker, from Dr. Blankenbaker's former associates, Drs. Jolley and Pruitt. The October, 1999, complaint alleged that Dr. Blankenbaker: (1) improperly billed patients; (2) failed to maintain adequate records; and (3) failed to supervise chiropractic assistants. The second complaint from November of 1999 (also from Drs. Jolley and Pruitt) complained that Dr. Blankenbaker had engaged in misleading or deceptive advertising for his clinics. The Board opened an investigation into all of these allegations. On July 13, 2000, at one of its scheduled public meetings, the Arizona State Board of Chiropractic Examiners voted to refer the complaints against Dr. Blankenbaker to an administrative hearing before an administrative law judge. The administrative hearing began before Administrative Law Judge Martin on November 21, 2001. On May 29, 2002, the hearing was completed. The November complaint filed by Drs. Jolley and Pruitt against Dr. Blankenbaker was dismissed in its entirety (the allegation of false or misleading advertising). Based upon the recommendations of the administrative law judge, the Arizona Board of Chiropractic Examiners found that Dr. Blankenbaker instructed an assistant who was not certified or registered, to schedule patients for chiropractic treatment to be performed by that assistant without any physician's supervision. The Board also found that Dr. Blankenbaker knowingly instructed an assistant who was not certified or registered to provide chiropractic treatments, and that Dr. Blankenbaker's knowing conduct was unprofessional conduct under A.R.S. Sections 32-924(B)(5)(B)(15) and (B)(16). The Board suspended Dr. Blankenbaker's license for three months, ordered that he serve two years of probation after the suspension and imposed a fine of \$1,000.00. The Plaintiff has timely filed his complaint with the Superior Court in this case.

¹ *Klomp v. Ariz. Dept. of Economic Security*, 125 Ariz. 556, 611 P.2d 560 (App. 1980); *Sundown Imports, Inc. v. Ariz. Dept. of Transp.*, 115 Ariz. 428, 431, 565 P.2d 1289, 1292 (App. 1977);

² *Ariz. Dept. of Economic Security v. Lidback*, 26 Ariz. App. 143, 145, 546 P.2d 1152, 1154 (1976).

³ *Schade v. Arizona State Retirement System*, 109 Ariz. 396, 398, 510 P.2d 42, 44 (1973); *Welsh v. Arizona State Board of Accountancy*, 14 Ariz. App. 432, 484 P.2d 201 (1971).

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Facts of the case

The record from the hearing before the administrative law judge revealed that Dr. Blankenbaker's chiropractic practice offered "VAX-D treatments", consisting of a traction device that creates pressure in a patient's intervertebral discs through various cycles of pressure and relaxation. Dr. Blankenbaker instructed an office clerical worker, Kara Sanders, on the procedures to provide the VAX-D treatments to patients. Ms. Sanders was not certified or registered as a chiropractic assistant. Ms. Sanders had no training or education in chiropractic treatments or medicine. Ms. Sanders was employed by the practice of Dr. Jeffrey Jolley. Dr. Randall Pruitt and Dr. Thomas Blankenbaker leased office space from Dr. Jolley. Though Sanders was an employee of Dr. Jolley, all of the chiropractors within the office space contributed to her salary. However, Dr. Blankenbaker compensated Ms. Sanders exclusively for the VAX-D treatment patients. Most importantly, neither Dr. Blankenbaker, nor any of the other chiropractors at Dr. Jolley's office, supervised Ms. Sanders when she provided treatments to patients.

Discussion

(a) The due process and equal protection claims.

The Plaintiff raises several issues in his memorandum, which will be dealt with in the order in which they were raised. First, Plaintiff contends he was denied due process and equal protection as a result of the "disparate treatment" by the Board, their biased investigation, and numerous delays between the time of the initial complaints and the final hearing before the Board. Finally, in section one of his claim of error, the Plaintiff contends that the conclusion of the Board is "not supported by the evidence, is contrary to law, and is arbitrary and capricious and constitutes an abuse of discretion...."⁴

In regard to Plaintiff's claims of disparate treatment and a biased investigation, the Plaintiff claims that the Board failed to investigate Drs. Jolley and Pruitt. Plaintiff contends that he was the only chiropractor in the office who was the subject of an investigation. However, Plaintiff ignores that he was the only chiropractor in the office who was the subject of the complaints that the Board was investigating. More importantly, even if an investigation of Drs. Jolley and Pruitt had revealed actionable professional misconduct, such acts would not have exonerated - - or excused, Plaintiff's own misconduct. Plaintiff's attempt to shift the focus of the inquiry from his own misconduct to the alleged misdeeds of others was properly rejected by the administrative law judge as irrelevant.

⁴ Plaintiff's Opening Brief, at page 26.
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Plaintiff also contends that the Board's failure to investigate and prosecute him in a timely fashion is grounds for reversal of the Board's decision. However, the Plaintiff alleges no prejudice, and none is apparent from the record. Moreover, it appears from the record from the Arizona State Board of Chiropractic Examiners and the Office of Administrative Hearings that the first evidentiary hearing scheduled August 28, 2001, was postponed at the request of Plaintiff. Thereafter, the Board's attorney requested a continuance on August 17, 2001 and Plaintiff's attorneys requested a continuance on August 23, 2001. The administrative law judge commenced the hearing on November 21, 2001, but was unable to complete both parties' presentation of evidence and arguments on that date. The evidentiary hearing was continued to January 28, 2002, but Plaintiff requested a continuance of that date, due to a "calendaring conflict". It appears from the record that further delays occurred as the result of the planned but unnoticed telephonic testimony of Dr. Pruitt. Further, it appears from a review of the record in this case that many, if not all, of the delays were either occasioned by Plaintiff, or Plaintiff's uncooperative conduct, or were acquiesced in by the Plaintiff. This Court finds no error.

Plaintiff also contends that the Board's decision is not supported by the evidence, is contrary to law, is arbitrary and capricious and constitutes an abuse of discretion. This Court may not substitute its own judgment for that of the agency on matters of factual issues or agency expertise.⁵ This Court's inquiry as to factual issues is limited to determining if there is any competent evidence within the record to sustain the agency's decision.⁶

It is clear from a review of the record that substantial evidence exists, primarily in the testimony of Kara Sanders, to support a conclusion from this court that substantial evidence exists to support the Board's decision. That decision was not contrary to law, arbitrary, capricious or an abuse of discretion.

(b) The denial of Plaintiff's Motion to Dismiss.

Plaintiff contends that the administrative law judge abused his discretion and erred, as a matter of law, in denying his Motion to Dismiss pursuant to A.R.S. Section 41-1061(B)(4). Specifically, the Plaintiff contends that the complaint and amended complaint were insufficient to give him notice of the charges and allegations pending against him by the Board.

The record in this case reflects that Plaintiff filed a Motion for More Definite Statement. That motion was granted by the administrative law judge and resulted in the filing of an Amended Complaint and Notice of Hearing, filed November 16, 2001.⁷

⁵ Webb v. State of Arizona and the Arizona Board of Medical Examiners, 202 Ariz. 555, 557, 48 P.3d 505, 507 (App. 2002), citing DeGroot v. Arizona Racing Commission, 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (App. 1984).

⁶ Schade v. Arizona State Retirement System, 109 Ariz. 396, 510 P.2d 42 (1973); Welsh v. Arizona State Board of Accountancy, 14 Ariz. App. 432, 484 P.2d 201 (1971).

⁷ The Board contends that this amended complaint was not filed until November 16, 2001, because the parties had agreed to attempt to settle the case prior to the filing of an amended complaint. The parties' attempts at settlement were not successful.

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The Amended Complaint in this case alleges in paragraph five (5) in regard to factual matters:

On or about July 1998 to February 1999, Dr. Blankenbaker instructed an unregistered non-certified assistant to schedule patients (approximately 10 in number) for treatment to be performed by that assistant knowing and intending that the treatment rendered would be without his required physician's supervision.

The complaint further alleged in paragraph six (6):

The conduct and circumstances described in paragraph 6 constitutes a violation of A.R.S. Section 32-924(B)(5), unprofessional conduct of a character likely to deceive or defraud the public or tending to discredit the profession, A.R.S. Section 32-924(B)(15), conduct which constitutes a danger to the health, welfare, or safety of the patient or the public, A.R.S. Section 32-924(B)(16), violation of a Chiropractic Act statute, A.A.C. R4-7-902.11, Failure to Properly Supervise a Chiropractic Assistant and A.A.C. R4-7-902.13, Violation of Any State Law, Rule, or Regulation Applicable to the Practice of Chiropractic.

The Plaintiff's claim about the lack of notice accorded him by the amended complaint is without merit. By the very words of the Amended Complaint, the Plaintiff was put on notice as to the time period within which his alleged misconduct had occurred, and, more importantly, the specific nature of the misconduct alleged by the Board. This Court finds no error in the administrative law judge's denial of Plaintiff's Motion to Dismiss.

(c) Evidentiary Issues.

The Plaintiff alleges that the administrative law judge erred in quashing subpoenas issued to Drs. Weathersby and Seitz (both members of the Arizona State Board of Chiropractic Examiners). Plaintiff argues that the administrative law judge incorrectly concluded that these witnesses' testimony was not relevant. However, the administrative law judge quashed the subpoenas because they were not timely served and the witnesses' testimony was not relevant to the issue alleged in the Amended Complaint of whether Plaintiff permitted an unlicensed and uncertified chiropractic assistant to provide treatment without supervision to patients. Plaintiff claims that Drs. Weathersby and Seitz were relevant to demonstrate their prejudice against him. The administrative law judge correctly concluded that possible prejudice by members of the

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Board was not a factual matter for the administrative law judge to determine given that an amended and specific complaint had been filed in his case. This Court finds no error.

Plaintiff also contends that the administrative law judge erred in permitting witness Kara Sanders to refresh her recollection from a written list of patients that she had prepared during the administrative hearing. This Court notes, as a preliminary matter, that the Uniform Administrative Hearing Procedures found in A.R.S. Section 41-1092 et seq. are applicable to hearings conducted by administrative law judges at the Office of Administrative Hearings. All relevant evidence is admissible in administrative hearings.⁸ Administrative hearings may be conducted in an informal manner “without adherence to the rules of evidence required in judicial proceedings.”⁹ More importantly, A.R.S. Section 41-1092.07(F)(1) provides in part:

Neither the manner of conducting the hearing nor the failure to adhere to the rules of evidence required in judicial proceedings is grounds for reversing any administrative decision or order if the evidence supports the decision or order is substantial, reliable and probative.

The administrative law judge permitted Kara Sanders to refresh her recollection from a list that she had prepared of patients and details pertaining to those patients’ names during the hearing. The administrative law judge also permitted Plaintiff to have a copy of that list and to use the list in his cross-examination of Ms. Sanders. The details of those specific patients whom the Plaintiff permitted Kara Sanders to treat without supervision was clearly relevant. It is also understandable that Ms. Sanders would have no specific recollection of each and all of the patients’ names without resort to some list or document to refresh her recollection. Finally, since the Plaintiff was permitted cross-examination on Ms. Sanders’ recollections and the list itself, this Court finds that the use of the list to refresh Ms. Sanders’ recollection was reliable and probative, and did not prejudice the Plaintiff.

Plaintiff also contends that the administrative law judge erred in refusing to admit in evidence documents that consisted of pleadings in other civil cases signed by Drs. Jolley and Pruitt’s attorneys, and limited the Plaintiff’s cross-examination of those witnesses. The probative value of these documents was certainly questionable. Administrative law judges are empowered to exclude evidence where the evidence’s probative value is outweighed by the danger of unfair prejudice, by confusion of the issues, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.¹⁰ The issues of prejudice and bias by Drs. Jolley and Pruitt against the Plaintiff were referred to repeatedly. At some point, this evidence clearly becomes cumulative, and further cross-examination serves little purpose. Therefore, this Court finds no error.

⁸ A.R.S. Section 41-1092.07(D).

⁹ A.R.S. Section 41-1092.07(F)(1).

¹⁰ A.R.S. Section 41-1092.07(D).

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Conclusion

Having reviewed the record and considered the memoranda submitted, this Court concludes that substantial evidence exists to support the Arizona Chiropractic Board's decision in this case. Furthermore, this Court concludes that the Board's decision is not contrary to law, not arbitrary, not capricious, and not an abuse of discretion. This Court also determines that the claimed errors alleged by the Plaintiff in his complaint and memorandum are without merit.

IT IS THEREFORE ORDERED affirming the determination and decision of the Arizona State Board of Chiropractic Examiners in this case.

IT IS FURTHER ORDERED denying all relief as requested by the Plaintiff in his complaint.

IT IS FURTHER ORDERED that counsel for the Defendant shall prepare a judgment and order consistent with this minute entry opinion, and lodge the same with this court no later than May 5, 2004.